within existing price cap constraints were presumed lawful after only limited review even before Congress deemed LEC tariffs lawful.[27]

3. *For Tariff Transmittals That Contain Both Rate Increases And Decreases, Whether To Use The 7-Day Or 15-Day Effective Date Should Be Determined Based On The Effect On The Current API (¶ 26)*

The *NPRM* tentatively concludes that the 15-day notice period should apply to tariff transmittals that contain both rate increases and decreases. NPRM, para. 26. This approach would not be in the public interest. Most services contain more than one rate element, and some rate elements in a tariff transmittal may be raised and some lowered. Interexchange access customers do not purchase separate rate elements; they purchase a whole service. Thus, it is unreasonable to determine the effective date based on the movement of separate rate elements. For instance, two rate elements for a service in a tariff filing might be lowered, while two might be raised, but the overall impact could be a reduction to the price of the entire service. It would make no sense, and would be contrary to §204(a)(3), to automatically treat that tariff filing as a rate increase and apply the 15-day effective date. Where the overall impact was a decrease, this approach would needlessly delay bringing the benefit of that price decrease to customers and would harm the LEC's ability to compete.

U.S. 574, 589 (1986). The predator must be reasonably sure that it will be able to drive existing competitors from the market and that new competitors will not replace the old ones once it raises its prices to monopoly levels in order to recoup its prior losses. No such reasonable expectation could be held in the telecommunications market. The size of the competitors (which include AT&T and other IXCs, Cable TV companies, CAPs, wireless providers and others) together with the large amounts of sunk costs that they have invested in communications facilities ensures that they have the ability and incentive to stay in the market. If one or more competitors were to leave the market, others would have the incentive to purchase the assets.

[27] *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637, 2643 (1991).

The Commission's suggestion that LECs could file two tariff transmittals -- one with rate increases on 15-days notice and one with rate decreases on 7-days notice -- would not help. This approach would confusingly bifurcate the tariff filing by rate elements and would double the LEC's, the Commission's, and other parties' burden and expense (*e.g.*, two filing fees and two Commission reviews with separate review by parties). Customers would be confused, and the LEC would find this approach impractical. As a result, the LEC would have to reject the idea of making two filings and, instead, would be forced to make one filing with a 15-day effective date, even though the tariff included price decreases and the overall effect was a decrease. Thus, this approach would be contrary to Congress's intent that rate decreases be effective in 7 days and to its "pro-competitive, deregulatory" goals.

This proposal actually would be a step backward, away from streamlining, since currently price cap LECs obtain a 14-day effective date so long as the rates for the tariff filing stay within price cap constraints, regardless of whether no, some, or all rate elements increase. The most reasonable solution is to adopt the price cap approach of relying on the effect of the tariff filing on the Actual Price Index ("API"). The API is the Commission's indicator of the overall effect of proposed rates on customers for a particular price cap basket. The 7-day effective date should apply to all filings that do not increase the current API. This approach will benefit customers and competition because customers will realize overall decreases in rates more quickly.

4. *The Commission Should Provide E-Mail Notice Of LEC Tariff Filings (¶ 26)*

The Commission solicits comments on "whether [it] should, as a convenience to interested parties, maintain a list of interested parties and provide affirmative notice to them by

e-mail when a LEC tariff is filed." NPRM para. 26. We support this approach and believe that it would be an excellent way to use an enhanced service to improve communication and streamline the tariff process. The notice should, of course, apply to all LEC tariff filings, not just incumbent LEC filings, consistent with Congress's application of §204(a)(3) to all LECs. In fact, the Commission should apply e-mail notice to all parties who file tariffs in order to expand the benefits of this process to all interstate tariffs.

5. The Notice Periods Are Calendar Days (¶ 26)

The Commission "tentatively conclude[s] that the statutory notice periods of 7 and 15 days refer to calendar days, not working or week days. We agree. If Congress had intended a different approach, it would have said so. The Commission uses calendar days for its 14-day effective date under price cap regulation.[28] Therefore, use of work or week days would be a step backward from streamlining, which clearly was not Congress's intent.

6. The Proposed Comment Period Is In The Public Interest (¶ 28)

We support the proposal that "petitions against those LEC tariff filings that are effective within 7 or 15 days of filing must be filed within 3 days after the date of the tariff filing and replies 2 days after service of the petition." NPRM para. 28. This is the most time that can be provided for rate decreases and still provide the Commission time for review. It also is an appropriate schedule for filings effective within 15 days, in order to give the Commission additional time to review rate increases. We agree that "in computing time periods, parties should be required to include intermediate holidays and weekends" and that "when a due date falls on a holiday or weekend, the document shall be filed on the next business day."

[28] *See, e.g.,* Public Notice, May 28, 1993, Tariff Filings Made On 14 Days' Notice.

The Commission proposes that "all such petitions and replies be hand-delivered to all affected parties, at least where the filing party is a commercial entity." Instead, the Commission should adopt the same service rules it adopted for 14-day notice tariffs under price caps. The Commission stated, "After careful review of all these comments, petitioners may serve their pleading on the filing carrier either personally to the carrier's designated domestic or Washington, D.C. representative or via facsimile."[29] The Commission also should conclude here, as it did there, that filing carriers may serve their replies on petitioners by mail. The Commission found that "it is unnecessary for carriers to personally serve their reply on petitioners since petitioners can not file a response."[30]

The Commission asks for comments on whether it "should not provide a public comment period during the 7/15 days' notice period" and on "whether Section 204(a) establishes a right for interested persons to request suspension and investigation of tariffs that may not be foreclosed." *NPRM*, para. 28. The Commission concluded in the Nondominant Carrier proceeding that advance scrutiny of tariffs to determine whether to suspend and investigate them was not necessary.[31] Nonetheless, we support allowing interested parties to comment on tariffs during the 7/15 days' notice period. For the reasons set forth in Part IV B above, the Commission should not rely exclusively on post-effective review of tariffs.

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[29] *Amendment to Section 1.773 of the Commission's Rules Regarding Pleading Cycle for Petitions Against Tariff Filings Made on 14 Days' Notice,* CC Docket No. 92-117, 8 FCC Rcd 1683, para. 15 (1993).

[30] *Id.* at para. 18.

[31] *Nondominant Carrier Order*, para. 23.

7. *The Commission Should Not Require Price Cap LECs To File TRPs Early (¶ 31)*

The Commission stated, "Because annual access tariffs involve rate increases and decreases, they appear to be eligible for streamlined filing under Section 204(a)(3)...." This is clearly true. With respect to carriers subject to price cap regulation, however, the *NPRM* proposes "to require carriers to file a TRP prior to the filing of the annual tariff revisions absent any information on the carriers' proposed rates, and to make it available to the public." *NPRM*, para. 31. The Commission should reject this proposal. Requiring price cap LECs to file tariff-related documents on a piecemeal basis prior to filing tariffs would be contrary to Congress's intent to streamline the tariff process. Moreover, additional time is not needed for review of the TRP information in question. The only TRP charts that do not contain information on rates and, thus, would be filed in advance of the tariff would be PCI-1 and EXG-1. The PCI-1 chart displays the LECs' calculations of their proposed PCIs. This chart is straightforward and does not require more than a few minutes for review and validation. The EXG-1 chart provides the exogenous cost adjustments for each price cap basket. Given the Commission's ever increasing constraints on costs that qualify for exogenous treatment under the price cap rules,[32] the data to be reviewed is minimal. Receiving these documents in advance of the tariff filing would not assist the tariff review process. Being required to calculate the figures and prepare and submit the documents early would be an unnecessary burden.

The lack of purpose or logic for this proposal that price cap LECs prematurely file a partial TRP is demonstrated by the *NPRM*'s proposal concerning rate of return LECs. The

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[32] *See, e.g., Price Cap Performance Review for Local Exchange Carriers*, CC Docket 94-1, 10 FCC Rcd 8961, paras. 292-309 (1995).

NPRM proposes that these LECs "file their TRPs and annual access filings that propose rate increases fifteen days prior to the scheduled effective date of July 1." Thus, rate of return LECs would file their TRPs at the same time as their tariffs. Since the rate of return LECs' TRPs provide forecasted cost and demand data, their TRPs are more subjective than the price cap LECs' TRPs which are based on historical data. Therefore, it would be illogical if the rate of return LECs' TRPs could be filed simultaneously with their tariffs, but the price cap LECs' TRPs could not. Both categories of LECs should be treated the same in this respect and both should file their TRPs together with their tariff filings, consistent with Congress's streamlining intent.

8. The Commission Should Not Establish In Advance Time Periods And Page Limits Related To Tariff Investigations (¶ 33)

The Commission seeks comment "on whether [it] should establish time periods for pleading cycles, and page limits of pleadings and exhibits" for tariff investigations. *NPRM*, para. 33. Because tariff investigations vary in their complexity and because the Commission and parties lack experience under §204(a)(3), the Commission should not attempt to determine these matters in advance. It should retain the flexibility to establish individualized time periods and page limits in its tariff investigation orders. Because of the new determinations of lawfulness and strong presumptions, discussed above in Part II of these Comments, the Commission is likely to find that it needs much less time for investigations and that the shortened period established by Congress is more than adequate.

9. The Commission Can Terminate Tariff Investigations By A Pro Forma Order (¶ 33)

The Commission asks whether it "can, consistent with Section 5(c) of the 1934 Act, as amended, terminate investigations by a pro forma order that adopts a decisional

memorandum or order of the Common Carrier Bureau." *NPRM,* para. 33. The Commission can follow this procedure.

Section 5(c) states that "the Commission may...delegate any of its functions (except...any action referred to in sections 204(a)(2)...." In 1988, Senator Daniel Inouye explained the purpose of this exception.[33] He explained that under §5(c)(7), "the filing of an application for review to the full Commission of a decision on delegated authority is a condition precedent to obtaining judicial review. Thus, even when the Bureau issues an order concluding an investigation, the petitioner must go through the additional hurdle of filing an application for review." Senator Inouye continued, "Petitioners who challenge a tariff decision should not have to face this many procedural obstacles before being allowed to get to court. This cumbersome procedure imposes too great a delay on the administrative process."[34] In order to fix this problem, §5(a) "establishes that any order concluding an investigation concerning the lawfulness of a tariff, whether conducted under 204(a) or under section 208, shall be issued by the Commission and shall be reviewable by the courts."[35] This change in the law did not affect the Commission's right to delegate authority to the Bureau to initiate and issue orders concerning a tariff investigation under §204(a)(1), but only the order concluding such investigation under §204(a)(2).

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[33] United States Code Congressional and Administrative News, 100th Congress, Second Session, 1988, Volume 6, p. 4111 (Public Law 100-594, FCC Authorization Act, Statement By Legislative Leader, Statement By Senator Daniel K. Inouye, Chairman Of The Subcommittee On Communications Of The Committee On Commerce, Science, and Transportation, 134 Congressional Record H. 10453, October 19, 1988).

[34] *Id.* at 4111-4112.

[35] *Id.* at 4112.

Thus, the purpose of the §5(a) limitation on the Commission's delegation of authority was not to ensure that the Commission was more closely involved with the order concluding an investigation. The purpose was to avoid additional, cumbersome procedures and quickly provide a final, appealable order. The Commission's *NPRM* proposal furthers this goal since the Commission would terminate an investigation by a pro forma order that adopts a decisional memorandum or order of the Bureau. This would avoid additional procedures and quickly provide an appealable order, consistent with Congress's streamlining goals in both §5(a) and §204(a)(3).

10. The Commission Should Conform Its Existing Notice Rules With The New Requirements In §204(a)(3) (¶ 34)

The Commission proposes "to change Section 61.58 of the Commission's existing rules governing notice periods for LEC tariff filings to make this section consistent with the streamlined notice periods of seven and fifteen days required by the 1996 Act." NPRM, para. 34. We support this proposal. In addition, the Commission needs to revise Section 69.3(h) to eliminate the 90-day notice requirement for price cap LECs' annual tariff filings. The Commission's rules must reflect the new requirements. By enforcing the rules in the pro-competitive, deregulatory manner intended by Congress in §204(a)(3), the Commission will help bring new benefits to the public.

V. Conclusion

For the reasons given, we urge the Commission to adopt the streamlining policies presented above in order to achieve Congress's "pro-competitive, deregulatory" goal of bringing more and better services to the American public at lower prices as quickly as possible. Regulations that create unnecessary delays or that are more burdensome than those specifically required in the 1996 Act would be contrary to that goal.

Respectfully submitted,

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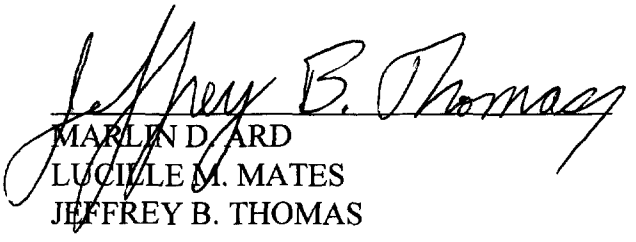

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